PREME COURT, U. S.

Supreme Court, U.S.
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No. 453

In the Supreme Court of the United States

OCTOBER TERM, 1970

HORTON R. PRUDDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner is under an indictment charging 17 counts of crimes against the revenue, including wilfully attempting to evade income taxes (26 U.S.C. 7201) and wilfully subscribing to false income tax returns filed for his sons (26 U.S.C. 7206(4)). Petitioner, a well educated businessman with a law degree, moved to suppress evidence obtained from him by Treasury agents on the theory that they "misled the defendant into believing that they were merely conducting an audit to determine his tax liability," thereby securing his unwitting cooperation. After an evidentiary hearing the district court ordered suppression. It found that the agents had not advised petitioner of his constitutional

rights or that they were conducting a criminal investigation, and that they had committed affirmative acts of deceit designed to lull petitioner into the belief that only a determination of his correct tax liability was involved.

The government appealed pursuant to 18 U.S.C. 3731, and the court of appeals reversed. It held that petitioner had failed to sustain his burden of proving fraud or deceit by the IRS agents in obtaining records (Pet. App. 25–31) and that they had no affirmative duty to advise him of his rights or that their investigation might have criminal consequences (Pet. App. 12–25).

1. Petitioner contends that the court of appeals misplaced the burden of proof on the question whether his production of records was obtained by fraud or deceit as to the scope of the tax investigation. He asserts that production of these records was protected by the Fourth Amendment and that the government, as in consent searches of dwellings, bore the burden of disproving fraud or deceit. *Bumper* v. *North Carolina*, 391 U.S. 543, 548–549. This case does not, however, involve the policy of protecting the privacy of the home, which explains the exception in *Bumper* to the general rule that the party moving to suppress evidence bears the burden of proving that it was illegally obtained. *Nardone* v. *United States*, 308 U.S. 338, 341. This case, rather, involves the voluntary production of business and tax records, as to which the individual's interest of privacy is significantly less and the government's interest in examining the records is greater. See *Jus-*

lice v. *United States*, 390 U.S. 199. Moreover, as the court of appeals held, the evidence shows that there was no fraud or deceit.

2. The court of appeals held that petitioner was not entitled to Miranda warnings at the time when a special agent entered the investigation because he was neither in custody nor otherwise deprived of his freedom in any significant way (Pet. App. 22). This is in accord with the rule in the Fifth Circuit, *Agnellino* v. *United States*, 409 F. 2d 833, 835, certiorari denied, 396 U.S. 824, and in seven other circuits, *Morgan* v. *United States*, 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Squeri*, 398 F. 2d 785, 788–790 (C.A. 2); *United States* v. *Cafiello*, 420 F. 2d 471 (C.A. 2), certiorari denied, 397 U.S. 1039; *United States* v. *Mancuso*, 378 F. 2d 612, 618 (C.A. 4), certiorari denied, 390 U.S. 955; *United States* v. *Miriani*, 422 F. 2d 150, 153–154 (C.A. 6), certiorari denied, June 22, 1970, No. 1546, O.T. 1969; *United States* v. *Mains*, 378 F. 2d 716, 718–719 (C.A. 6), certiorari denied, 389 U.S. 905; *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Feichtner* v. *United States*, 389 F. 2d 498 (C.A. 9); *Housley* v. *United States*, 406 F. 2d 481, 484 (C.A. 10).

Petitioner contends that these holdings, including the one in the case at bar, are in conflict with *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7). In *Dickerson*, the court upheld a suppression order on the ground that a taxpayer must be given *Miranda* warn-

ings "at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division" (p. 1117), but it made its holding applicable only to "interrogations taking place after the date of this decision," July 28, 1969 (p. 1117). Thus, even if the *Dickerson* rule were applied to the case at bar the evidence would not be suppressible because it was obtained in 1963 and 1964.

In view of the purely prospective nature of the *Dickerson* holding and the present policy of the Internal Revenue Service to give virtually full *Miranda* warnings to all taxpayers when they are first interviewed by a special agent,[1] there should be few, if any, future cases which will meet a different fate in the Seventh Circuit than in any other circuit. See *United States* v. *Campione*, 416 F. 2d 486 (C.A. 7), certiorari denied, 397 U.S. 909; *United States* v. *Gallagher*, C.A. 7, No. 18,000, and *United States* v. *Townsend*, C.A. 7, No. 18,159, both decided July 9, 1970. The conflict, therefore, does not warrant further review by this Court.

3. There was no duty, aside from *Miranda* and *Dickerson*, to advise of the possible criminal consequences of the investigation as petitioner contends (Pet. 18–22). Treasury agents are required only to

[1] By news release dated November 26, 1968, the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must warn him of his constitutional rights, including the right to counsel, but not including the proffer of legal aid unless the taxpayer is in custody. The news release notes that this "new procedure goes beyond most legal requirements that are designed to advise persons of their rights." 1968 CCH Fed. Tax Reporter, par. 6946; 1968 Prentice-Hall Fed. Taxes, par. 55,476.

advise a taxpayer that they are concerned with the accuracy of his returns. In this advice, there is inherent a warning that they will pursue evidence of misreporting without regard to the shadowy line between evasion and avoidance. *United States* v. *Schiffani*, 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *Greene* v. *United States*, 296 F. 2d 841, 842–843 (C.A. 2); *United States* v. *Ercoli*, 245 F. 2d 284, 286 (C.A. 3), certiorari denied, 355 U.S. 819; *Turner* v. *United States*, 222 F. 2d 926, 930–932 (C.A. 4), certiorari denied, 350 U.S. 831; *Montgomery* v. *United States*, 263 F. 2d 887, 892–893 (C.A. 5); *Biggs* v. *United States*, 246 F. 2d 40, 44 (C.A. 6); *Zachey* v. *United States*, 227 F. 2d 249, 225–226 (C.A. 8), certiorari denied, 350 U.S. 923. In any event the court of appeals, after a careful examination of the undisputed facts, properly concluded that it was "entirely implausible" that petitioner was unaware of the possible criminal consequences of this investigation (Pet. App. 34).

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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